No. 17352

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FAYE LYONS,

Appellant,

vs

ELSINORE C. MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division

---

APPELLANT'S REPLY BRIEF

WELBURN MAYOCK
W.S. MAYOCK
524 South Spring Street
Los Angeles 13, California

Attorneys for Appellant

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 17362

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FAYE LYONS,

Appellant,

vs

ELSINORE C. MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division

---

APPELLANT'S REPLY BRIEF

STATEMENT OF THE PLEADINGS AND FACTS

Appellant will not repeat her Statement of the Pleadings and Facts as set forth on pages 2 to 4, inclusive, of her Opening Brief. Respondent conceals an important part of the verdict by words which connote a general verdict for the Appellee was returned (Appellee's Brief, p. 2, lines 5-10, incl.).

The "verdict" itself is to be found on page 21 of the Transcript of Record.

It shows that two defenses had been urged: (a) Truth, (b) Privilege. The verdict was for the Appellant and against the Appellee on the defense of "Truth". The verdict was for the Appellee and against the Appellant on the issue of "Privilege". The appropriate Judgment in favor of Appellee for costs followed (Tr. p. 22-23) wherein the recital that the defense of "truth" had not been established was repeated.

STATEMENT OF THE CASE ON APPEAL

In Appellee's Statement of the Case on Appeal (p. 4, lines 8-12, incl.) Appellee states "The evidence of the association and conduct of Appellant and the husband of Appellee certainly cannot be said, by any stretch of the imagination, to provide reasonable and probable cause for believing otherwise than as Appellee believed".

Appellee completely ignores the law that it was only information which she knew at the time of the libel which can be considered in the defense of "privilege". Davis v. Hearst, 160 Cal. 143-196.

Appellee searches the evidence at the trial on both issues of Truth and Privilege to find substantial evidence to sustain the verdict on the issue of

Privilege. Such evidence is not available on the issue of Privilege. Appellee is restricted to evidence she knew at the time of the libel which she has testified was restricted to the Blanche Lampert Statement (Rep. Tr. p.306, line 7 to P. 308, line 2, incl.).

Appellee's rhetorical assertion about adultery, being in effect the only inference which could be drawn from the evidence "by any stretch of the imagination", finds massive refutation in the "verdict" which found that inference untrue, in the granting of a new trial on the first trial because of the insufficiency of the Blanche Lampert Statement plus "what her husband had told her prior to their marriage" and "what her attorney had told her" and also in the opinion of this Honorable Court in the first Appeal (Gilliland v. Lyons, 278 F.2d 56).

Until Appellee first heard the Lampert Statement (Exhibit No. 8) she had never heard of Appellant. This follows from her own testimony, Rep. Transcript p. 17, lines 1-5:

> "Q. By Mr. Mayock: Did you direct your attorney to make any effort to serve Fay Lyons with your Cross-complaint in this action?" (Divorce action).

"A. I didn't even know Fay Lyons. I never even heard of her name."

Again on Rep. Transcript (p. 25, line 8 to 23, incl.) the following appears:

"Q. By Mr. Mayock: Mrs. Gilliland, the Blanche Lampert statement that was made in Arizona was dated November the 2nd in 1955. I say this for the purpose of refreshing your recollection. Had you talked with Blanche Lampert before that?

"A. I have never talked to Blanche Lampert. I have never spoken to a single soul in my life about the case.

"The Court: Whose housekeeper was Blanche Lampert?

"The Witness: She was Mr. Gilliland's housekeeper. I had never spoken to her. The only time we heard from her was when Mr. Murphy came down and took the affidavit. That was the only time I ever heard about these women.

"Q. By Mr. Mayock: But you had spoken to Blanche Lampert?

"A. I beg your pardon. We have never talked about women."

Appellant will not labor this point any further. Appellee has completely overlooked or completely ignored the ruling in Davis v. Hearst, supra, to the effect that in the defense of Privilege only knowledge of what the libelant knew at the time of the libel can be considered. At least the Brief of Appellee fails to consider or refer to this point.

ARGUMENT

In that portion of Appellee's Brief denoted Argument on p. 5, the basic fallacy of Appellee stands starkly revealed. Appellee asserts that on the defense of Privilege which is the only matter we are concerned with in this appeal "the basic question is whether or not there was evidence adduced at the trial from which the members of the Jury could determine (as they did) that Appellee, in making the allegations in her divorce complaint did so without malice toward Appellant and had reasonable and probable cause for believing the truth of the allegations".

Here is fundamental error. Not at the trial years later, but when she published the libel did she have sufficient knowledge to meet the test of probable cause? Not what Appellee with skillful counsel backed by a millionaire could with money and

detectives assemble for the trial in the way of evidence, but what she knew when she chose to libel the Appellant alone is available to her on the issue of Privilege.

She has testified that this consisted of the Blanche Lampert Statement alone. To this, vague assertions of "what her husband told her" may be added. At the time of the libel he had told her nothing about any women, but on the contrary, had denied any misconduct with women. (R.Tr. 170, lines 6-13)

What her husband told her, according to her alone, many months after the libel is not available evidence on the defense of Privilege.

What neighbors told her did not concern Appellant, but referred to unidentified women having been seen in Mr. Gilliland's yard.

What Appellee's attorney told Appellee was that months before Appellant came to California he saw a strange woman's face in Mr. Gilliland's house when he peeked through a window and that later when he accused Mr. Gilliland of having a woman in his house he replied "What of it?".

In evidence available on the defense of Privilege only the Blanche Lampert Statement mentions Appellant and it asserts that Appellant did not go to Las Vegas.

On this information only plus a stipulation that Appellant was in Florida at the time she was accused of adultery in Las Vegas, Nevada, Appellee bases her unsubstantiated defense of Privilege as to the Las Vegas adultery.

Both the learned District Judge on the granting of the New Trial and this Honorable Court on the Appeal from the order granting the New Trial have pointed out the insufficiency of this restricted evidence to meet the obligation of Appellee, under the Statute on the element of probable cause.

The record is equally silent on the libel of adultery in Arizona. Appellee states that the record shows that.

In re: Propensity

Appellant completely disagrees with Appellee on the matter of propensity. Appellee says it is irrelevant (App. Brief. p. 8, line 25). Appellant respectfully contends that since "probable cause" is the basis of the defense of Privilege, proof of "probable cause" to believe adultery must be shown by Appellee. The evidence upon which Appellee relied must be such as to lead a reasonable person to believe adultery had occurred. This evidence must be direct

or indirect. There was no direct evidence available to Appellant at the time of the libel.

Therefore, her "probable cause", if any, must be found in "indirect evidence". This must be found in the Blanche Lampert Statement. "Propensity of both parties" is an indispensable element in the inference of adultery by indirect evidence. It is equally an indispensable element in the inference of adultery inherent in probable cause to draw the inference of adultery.

CONCLUSION

Appellee has failed to consider or evaluate three principles of law which in the opinion of Appellant are determinative of this appeal.

(1) What evidence is available to a libelant on the defense of "Privilege"?

(a) Appellant says "only evidence of which libelant was aware at the publication of the libel" and cites Davis v. Hearst, supra.

(b) Appellee says "all evidence introduced at the trial" and bases her position on assertion only, citing no precedents.

(2) Can the inference of adultery based upon indirect evidence be proved without proof of

"propensity" of both parties to commit the adultery?

(a) Appellee says "yes" it can be proved by proof of propensity of one only of the alleged adulterers and bases her conclusion on assertion only, citing no precedents.

(b) Appellant says "no" it can be proved only by proof of propensity of both parties and cites ample precedents (pp. 28 and 29 of her Opening Brief).

(3) Can proof of "probable cause" by indirect evidence be established without proof of propensity of both parties?

(a) Appellee says "yes" and cites neither precedent nor argument on the matter.

(b) Appellant says "no", and argues that since indirect evidence of adultery must depend on proof of propensity of both parties before a reasonable inference can be drawn it follows that "probable cause" must also require the same essential element for the purpose of drawing a reasonable inference of adultery on that issue.

To hold otherwise is to hold that probable cause can be "unreasonably" or illogically inferred.

Appellant therefore respectfully urges a reversal of the Judgment and verdict and again urges that

in remanding the cause for a new trial the issue be restricted to the issue of damages alone.

Respectfully submitted,

WELBURN MAYOCK
W.S. MAYOCK

By WELBURN MAYOCK

Attorneys for Appellant